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Nos. 84-871, 84-889, 84-1054 and 84-1069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOUISIANA PUBLIC SERVICE COMMISSION,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, et al.,
Appellees.

(and three related cases)

On Appeal from and Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CONSOLIDATED MOTION TO DISMISS OR AFFIRM AND BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

DONALD MCG. ROSE*
DAVID HORN
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202
513-651-6944

Attorneys for Cincinnati Bell Telephone Company

JOHN WOHLSTETTER*
1800 K Street, N.W.
Washington, D.C. 20006
202-466-2895

Attorney for Continental Telecom, Inc.

MICHAEL BOUDIN*
DAVID H. REMES
ELIZABETH V. FOOTE
1201 Pennyslvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
202-662-6000

Attorneys for AT&T and the Bell Operating Companies (other than Cincinnati Bell, Nevada Bell, and Pacific Bell)

[List of Counsel Continued on Inside Cover]

33 pp

CAROLYN C. HILL*
JAMES T. ROCHE
1875 Eye Street, N.W.
Washington, D.C. 20006
202-659-4600

MARIA KENDRO
P.O. Box 11315
Kansas City, MO 64112
913-676-3000

Attorneys for United Telephone Systems, Inc.

JUDITH A. MAYNES
W. PRESTON GRANBERY
295 North Maple Avenue
Basking Ridge, NJ 07920
201-221-2004

Attorneys for AT&T

ALBERT H. KRAMER*
2000 M Street, N.W.
Washington, D.C. 20036
202-223-6611

Attorney for North American Telecommunications Association

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**Counsel of Record*

QUESTION PRESENTED*

Section 220 of the Communications Act, 47 U.S.C. § 220, provides that the Federal Communications Commission "shall" determine depreciation for telephone company plant of carriers subject to the Act; it invites the states to give their views and recommendations to the FCC; and it forbids the carriers from using any depreciation rate, or depreciating any plant, except as permitted by the FCC. The question presented is:

Whether the FCC acted within the scope of its authority and rationally exercised its expert judgment in determining that telephone plant used interchangeably for interstate and intrastate communication must be depreciated according to the FCC's rules and orders and that state commissions cannot require the companies to use inconsistent rates and methods to depreciate the same plant.**

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* The listing required by S. Ct. Rule 28.1 appears in the appendix to this document. See p. 2a, below.

** Answering this question in the affirmative, the Court of Appeals sustained the FCC without reaching an independent, alternative ground for preemption, namely, automatic statutory preemption under Section 220. See p. 6, n.11, below. In the event that this Court grants plenary review, appellee respondents reserve the right to defend the FCC on each of the alternative grounds.

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This consolidated motion to dismiss or affirm and brief in opposition is filed on behalf of 26 parties who supported the Federal Communications Commission in the court below.[1] It demonstrates that no appeal lies in this case and that certiorari is not warranted.

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[1] The names of the subscribing parties are set forth in the appendix to this document. See p. 1a, below.

STATEMENT OF FACTS

In 1980 and 1981, the Federal Communications Commission made substantive changes in its technical rules for determining depreciation of telephone plant in the United States. Thereafter, the FCC ruled in 1983 that it would frustrate federal policy for individual states to order telephone companies to depreciate the same telephone plant using depreciation rates or methods inconsistent with those adopted by the FCC. The Fourth Circuit upheld the 1983 preemptive decision as rational and within the FCC's statutory authority under decisions of this Court and a uniform line of cases in the courts of appeals.

A. The Statutory Plan and the FCC's Depreciation Rules

Local telephone plant in the United States is used jointly for interstate and intrastate communication. Whether a call travels across the street or across the United States, it originates in the same telephone set or switchboard, uses the same "inside wiring" in the home or office, and traverses the same cable to the switching facilities at the telephone company central office. From the standpoint of physical facilities, the United States has long had "a unified system of communication." [2]

This joint use of telephone plant was recognized by Congress from the outset. Section 220(b) of the Communications Act of 1934 ("the Act"), 47 U.S.C. § 220(b), provides that the FCC "shall" prescribe depreciation for carriers subject to the Act. Depreciation measures the loss of service value of a capital asset over time by allocating the asset's cost, through an annual depreciation expense, to the individual years in which the asset is usefully in service. That depreciation expense is reflected in rates for the services provided by the carrier and, because local telephone plant is used for both interstate and intrastate services, the depreciation expense

[2] *General Telephone Company of California* v. *FCC*, 413 F.2d 390, 401 (D.C. Cir.) (Burger, J.), *cert. denied*, 396 U.S. 888 (1969).

affects both interstate and intrastate rates for telephone service.[3] However, depreciation does not itself determine those rates, which reflect many other elements. See pp. 15-16, below.

Recognizing the dual impact of depreciation, Section 220 reserves to the FCC the ultimate decision on depreciation of jointly used telephone plant of carriers subject to the Act. Section 220(b) explicitly forbids such carriers from depreciating any property, or using any rate of depreciation, other than as permitted by the FCC. Congress took account of the impact of Section 220 on the states by requiring the FCC to consider the "views and recommendations" of the states before adopting or altering accounting requirements including depreciation. Section 220(i), 47 U.S.C. § 220(i). In enacting Section 220, Congress deliberately rejected a proposed amendment to that section, urged by the states, that would have granted the states a right to ignore FCC depreciation decisions and set separate depreciation rates for use in intrastate ratemaking. See pp. 12-13, below.

Consistent with this explicit mandate, the FCC has for almost 50 years maintained rules governing depreciation of telephone plant.[4] In addition, for the major carriers owning the bulk of telephone plant in the United States, the FCC has prescribed specific depreciation rates for classes of property owned by such companies. In adopting depreciation rules and prescribing specific rates, the FCC has consulted with state commissions and considered their views, but the rules and

[3] For example, if a line connecting a house with the cable to the local exchange cost $100 and was expected to last 10 years, one common method of depreciation would assign $10 a year as an expense to be recovered through rates for telephone service over 10 years. For jointly used plant, the FCC also has paramount authority to "separate" the expense between the interstate and intrastate rates. See Sections 221(c) and 410(c) of the Act, 47 U.S.C. §§ 221(c), 410(c). Thus, depending on the separations formula adopted by the FCC, part of the $10 per year would be reflected in interstate rates and the balance in intrastate rates.

[4] Since the 1930s, the FCC has prescribed and revised a Uniform System of Accounts for telephone companies, including rules determining the categories of plant that may be depreciated (*e.g.*, 47 C.F.R. § 31.02-82) and rules determining methods of depreciation. *Id.* § 31.02-80.

orders have been those of the FCC itself.[5] For many years, state commissions tended voluntarily to respect those FCC rules and orders.

Complex questions of engineering, accounting and regulatory judgment are involved in establishing depreciation for literally millions of diverse pieces of telephone plant constantly undergoing replacement in the United States. Various methods exist for allocating depreciation to different years, estimating the useful life of plant, appraising salvage value, correcting misestimates of useful life, and grouping related items of plant. In a period of rapid technological innovation, the FCC has made a continuing effort to improve depreciation rules so that the resulting regime is workable, consistent and accurate.

After several years of study, the FCC in 1980 and 1981 revised certain of the depreciation rules.[6] First, in 1980, it ruled that telephone companies would be allowed to use two methods, called equal life group and remaining life, in computing depreciation of telephone plant and in revising estimates of depreciation that proved to require correction.[7] Second, in 1981, the FCC ruled that a particular class of plant—a portion of inside wiring—should be "expensed" when actually installed rather than depreciated over a period of years.[8]

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[5] *E.g., In re Prescription of Revised Percentages of Depreciation for AT&T,* 88 F.C.C.2d 1223 (1982), containing depreciation tables for over 20 telephone companies.

[6] *In re Amendment of Part 31,* 83 F.C.C.2d 267 (1980), *reconsideration denied,* 87 F.C.C.2d 916 (1981); *In re Amendment of Part 31,* 85 F.C.C.2d 818 (1981).

[7] Equal life group is a method of depreciating, on a group basis, subclasses of telephone plant (*e.g.,* telephone poles) whose individual units are forecasted to have the same useful lives. Remaining life is a method of adjusting depreciation, where original estimates of useful life have proved to be mistaken, so that at the end of the useful life the depreciation will add up to 100% of the investment (less salvage value), avoiding under- or over-recovery.

[8] Section 220 empowers the FCC to decide which categories of plant should be depreciated as capital assets and which should instead be "expensed" in a single year. For the inside wiring involved, the FCC found that such expensing would place the cost burden on the class of users that caused those costs to be incurred.

In the proceedings that led to these changes in the depreciation rules, many parties participated, including a number of state commissions. The FCC extensively analyzed the need for the new rules and provided for specific options and phase-in periods to ease the transition. When the new rules were promulgated, neither the states nor any other parties sought judicial review within the statutory period. The rules therefore became final and are no longer subject to judicial review. 28 U.S.C. § 2344.

B. The FCC's Preemption Decision and Judicial Proceedings

Following the changes in depreciation rules in 1980 and 1981, the National Association of State Regulatory Utility Commissioners ("NARUC") and the California Public Utilities Commission asked the FCC to hold that the new rules were not binding on the states. In a decision released in 1982, the FCC affirmed that it had authority to preempt state measures that "frustrate [federal] policies or rules" but by a four-to-three vote the FCC found no present need to exercise that authority.[9] As the FCC later explained, it had assumed in refusing to preempt that the state commissions would continue their ordinary practice of following FCC depreciation rulings.[10]

AT&T and GTE sought reconsideration of the FCC's 1982 decision. They pointed out that states were now deviating from the new depreciation rules, thwarting the FCC's depreciation policies. On reconsideration in early 1983, the FCC held unanimously that its new depreciation rules on equal life group, remaining life and inside wiring had to be followed in state proceedings. 1983 Decision (A-24). It found that its new rules were being disregarded in a number of states and that the objectives that the FCC sought to achieve through the rules

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[9] *In re Amendment of Part 31,* 89 F.C.C.2d 1094, 1108 (1982), reprinted at Louisiana Appendix A-61 (references hereafter to "A- " are to that appendix). The decision also found that Section 220 did not compel the FCC to preempt.

[10] *In re Amendment of Part 31,* 92 F.C.C.2d 864, 866-67 (1983) (A-27 to A-28) (cited hereafter as "1983 Decision").

would be frustrated by inconsistent state action. *Id.* ¶ 37 & n.14 (A-46).[11]

The FCC emphasized that the plant in question is used interchangeably for interstate and intrastate communication. 1983 Decision ¶ 37 (A-45). It explained how accurately timed capital recovery, which its new depreciation rules assist, directly promotes the modernizing of telephone plant and ultimately permits more efficient service at lower cost for the public. *Id.* ¶ 33 (A-43). It described how the states' use of inconsistent depreciation methods for the same plant threatened these federal policies and impaired the FCC's ability to assure a proper allocation of joint costs between interstate and intrastate service. *Id.* ¶ 39 (A-47). It specifically found that preemption was "essential" in order to avoid "frustration of these vital national policies." *Id.* ¶ 40 (A-47).[12]

The Virginia State Corporation Commission sought judicial review of the 1983 preemption decision in the Fourth Circuit, and a number of other state commissions intervened to support review. The FCC, the United States, and a number of other parties defended the decision. In the Court of Appeals, the state commissions did not challenge the FCC's decision that equal life group and remaining life and the expensing of inside wiring served the public interest. Principally, they argued that the FCC had no power to make its depreciation rules binding, contending that the Act reserved to the states the right to use different depreciation rates for the same telephone plant in state proceedings.

In June 1984, the Court of Appeals affirmed the FCC's 1983 preemption decision.[13] It held that the FCC had explicit

[11] In the alternative, the FCC found, based on reexamination of statutory language and legislative history, that preemption could be premised on the automatic operation of Section 220 without requiring a specific FCC finding of need. However, in light of the FCC's supported finding of need in this case, the Fourth Circuit found it unnecessary to reach the alternative ground of automatic preemption in order to sustain the FCC's action.

[12] The FCC did not preempt the states in determining the ultimate rates to be charged to customers for intrastate services. Its decision was limited solely to depreciation. *Id.* ¶¶ 44-45 (A-49 to A-50).

[13] *Virginia State Corporation Comm'n* v. *FCC*, 737 F.2d 388 (4th Cir. 1984) (A-1).

statutory authority under Section 220 to determine depreciation for telephone plant used jointly for interstate and intrastate service. Under preemption principles well established in this Court, the Fourth Circuit ruled that the FCC could exercise preemptive authority under the Act to exclude inconsistent state regulation where, as here, the statute does not bar such preemption.[14] Finally, the lower court found, on the facts of this case, that the FCC had rationally justified its preemptive action.

The Fourth Circuit rejected claims that the FCC's preemptive action invaded authority reserved to the states under the Act. The court noted that the same construction of the Act being urged by the state commissions had been uniformly rejected by the circuit courts including two prior decisions of the Fourth Circuit, followed by denials of certiorari in this Court,[15] and prior decisions of the First, Second and District of Columbia Circuits.[16] The Fourth Circuit denied rehearing and rehearing *en banc* in October 1984 without further opinion.[17]

The FCC's 1983 preemption decision has now been in effect for almost two years and the majority of states have respected the FCC's new depreciation rulings. In a limited

[14] The Fourth Circuit relied directly on *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141 (1982), where this Court reaffirmed that preemption could be based on an exercise of federal-agency authority under a statute that left states free to act in the absence of agency preemption.

[15] *North Carolina Utilities Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) ("*NCUC II*"); *North Carolina Utilities Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) ("*NCUC I*").

[16] *Computer and Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) ("*Computer II*"); *Puerto Rico Telephone Co.* v. *FCC*, 553 F.2d 694 (1st Cir. 1977); *New York Telephone Co.* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980); *People of State of California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

[17] One judge, who had earlier dissented in both *NCUC I* and *NCUC II*, dissented from both the panel decision and the denial of rehearing *en banc*. In none of the three cases has any other judge agreed with the dissent's position.

number of cases, state commissions have sought to disregard the depreciation rulings, resulting in federal district court actions to enforce the FCC's depreciation rules. See pp. 18-19, below. However, no enforcement issues were before the Fourth Circuit in the present case; the decision below addressed itself solely to the validity of the FCC's 1983 preemption decision under Section 220 and doctrines governing preemption.

The Louisiana Public Service Commission has now docketed a purported appeal in this Court to challenge the Fourth Circuit decision (No. 84-871). Certiorari petitions to review the same decision have been filed by the California Public Utilities Commission and a number of other state commissions (No. 84-889), by the Ohio Public Utilities Commission (No. 84-1054), and by the Florida Public Service Commission (No. 84-1069). The gist of the state commission claims in all of the documents, echoing claims made and previously rejected in four courts of appeals, is that the FCC lacked authority to preempt inconsistent state action.

ARGUMENT

The "appeal" filed by Louisiana is outside this Court's appellate jurisdiction and should be dismissed on that ground. Appeals under 28 U.S.C. § 1254(2) lie only where an individual state statute is "expressly struck down" on constitutional or related grounds,[18] and the Fourth Circuit decision has not "expressly struck down" any state statute, rule, or order.[19] The sole action taken by the Fourth Circuit was to uphold the validity of the FCC's 1983 preemption decision measured by the Communications Act and the case law governing federal agency preemption. If Louisiana is arguing that state measures were undercut by implication, that is exactly the class of cases

[18] *Silkwood* v. *Kerr-McGee Corp.*, 104 S. Ct. 615, 620-21 (1984), citing numerous cases and affirming the policy that statutes authorizing appeals to this Court "are to be strictly construed."

[19] Although Louisiana refers to several Louisiana orders as if the Court of Appeals had invalidated them (J.S. 2), no reference to them appears in the Fourth Circuit decision, and they were not discussed in the briefs filed in the Fourth Circuit.

that *Silkwood* held "do not" come within the scope of the appeal statute. 104 S. Ct. at 621.

Viewing this case alternatively as one in which certiorari is sought, it should be denied under the accepted standards for review. The Fourth Circuit decision is consistent with preemption doctrine in this Court and the uniform construction of the Communications Act in four circuits. The FCC's power to preempt depreciation is supported by the language of Section 220 and by specific legislative history showing that Congress in 1934 deliberately refused to grant the very authority now claimed by the states. The FCC has amply supported its finding that federal depreciation policies would be frustrated if states utilized inconsistent depreciation rates and methods for the same telephone plant governed by the FCC's own rules.[20]

I. The Decision Below Applies Settled Preemption Doctrine, Accords With the Statute and Its Legislative History, and Rests on Reasoned Findings by the Expert Agency.

1. Local telephone plant, jointly used to carry interstate and intrastate communication, is subject to the FCC's authority under the Act.[21] Section 220(b) applies to such plant and gives the FCC express authority to determine depreciation for it. In this case, the Fourth Circuit affirmed that the FCC, in exercising that statutory authority, could preempt state attempts to depreciate the same telephone plant using inconsistent rates or methods.

Although Section 220 contains language to suggest that it is automatically preemptive, it was unnecessary for the Fourth Circuit (and is unnecessary for this Court) to decide this issue. Under settled doctrine in this Court, a federal agency addressing a subject within the scope of its general statutory authority can preempt inconsistent state regulation where the federal agency rationally finds that this step is necessary to achieve

[20] For these same reasons, summary affirmance would be called for in No. 84-871 if it were treated as a proper appeal.

[21] The Act gives the FCC authority over "interstate communication", and includes within the definition of communication "all instrumentalities, facilities [and] apparatus . . . incidental" to transmission. Sections 2(a), 3(a), 3(b), 47 U.S.C. §§ 152(a), 153(a), 153(b).

federal policy and where such preemption does not violate the statute. Only last Term, in *Capital Cities Cable, Inc.* v. *Crisp*, 104 S. Ct. 2694 (1984), the Court reaffirmed the governing rule:

> "When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is . . . limited: 'If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' "[22]

This doctrine has been uniformly applied in prior cases in four different circuits (see p. 7, above) to sustain preemptive action by the FCC, including regulation affecting telephone plant jointly used for interstate and intrastate communication. In this case, the Fourth Circuit applied the settled test: it determined that the FCC did possess authority over depreciation of such plant, that the Act did not bar preemption, and that the agency had provided a rational basis for concluding that inconsistent state regulation would frustrate federal policy. In sum, the preemption doctrine applied by the Fourth Circuit is consistent with decisions of this Court and the courts of appeals.

The basis for preemption is even stronger in this instance than in the ordinary case because of the balance struck by Congress between federal and state authority in Section 220 itself. That statute expressly gives the FCC authority to determine the "depreciation which shall be charged"; it provides that the states' role is to furnish their "views and recommendations" to the FCC; and it forbids the carriers from charging depreciation "other than that prescribed therefor by the [Federal Communications] Commission." Sections 220(b), (i). Therefore, the FCC's authority to preempt is solidly

[22] 104 S. Ct. at 2700, quoting *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta, supra*, 458 U.S. at 153-54, and *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

grounded in a statutory plan that contemplates federal superintendence where depreciation is involved.[23]

2. The state commissions argue that even if preemption is otherwise within the FCC's authority, it is barred by Section 2(b)(1) of the Communications Act, 47 U.S.C. § 152(b)(1), which withholds from the FCC jurisdiction over intrastate communication.[24] The dispositive answer is that jointly used plant, whose depreciation is at issue in this case, is subject to the FCC's jurisdiction over interstate communication under Section 2(a) and does not constitute the type of intrastate communication Congress meant to insulate under Section 2(b). A consistent line of decisions in four circuits has reached this conclusion.[25] No circuit has taken the contrary view.[26]

This uniform reading of the Act by the circuit courts is reinforced by decisions of this Court construing the FCC's mandate. This Court has repeatedly stressed the breadth and flexibility of the FCC's authority where interstate communication is involved and has in such cases upheld FCC regulation despite the effect on local activities or regulation.[27] The

[23] Congress followed a similar approach in two other related sections of the Act that also deal with jointly used plant. Sections 221(c) and 410(c) give the FCC final authority to separate costs of jointly used plant between federal and state jurisdictions (see p. 3, n.3, above) after considering a recommendation from a federal-state panel. *NCUC I, supra*, 537 F.2d at 795.

[24] Although the state commissions also refer to Section 221(b) of the Act, 47 U.S.C. § 221(b), legislative history shows that this provision was directed to the narrow problem, not involved in this case, of local exchanges overlapping state lines. See, *e.g.*, *Computer II, supra*, 693 F.2d at 216-17 & n.103, citing legislative history and decisions of three other circuits.

[25] See p. 7, above. Section 2(b) has been uniformly interpreted not to preclude FCC regulation of "facilities that necessarily serve both interstate and intrastate communications" (*NCUC I*, 537 F.2d at 794); rather, the provision is directed to intrastate subjects which are "separable from and do not substantially affect" interstate communication. *Computer II*, 693 F.2d at 215, quoting *NCUC I*. This Court denied certiorari in both cases.

[26] Florida's citation of *NARUC* v. *FCC* 533 F.2d 601 (D.C. Cir. 1976), relies on language rejected by two of the three judges in that case. See *id.* at 621, 634. The D.C. Circuit's definitive view is stated in the subsequent *Computer-II* case, which directly relies upon the Fourth Circuit precedents. 693 F.2d at 215-16.

[27] See, *e.g.*, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *Capital Cities Cable, Inc.* v. *Crisp, supra*, 104 S. Ct. 2694.

Chief Justice made the same point 15 years ago in a court of appeals decision, construing the Act in light of this Court's decisions, and concluding that the United States has "a unified system of communication" whose effective regulation would be frustrated in the absence of a "central authority." [28]

The states' reliance on Section 2(b)'s general language is misplaced for yet another reason. Section 220 enacts a detailed regime for the setting of depreciation by the FCC and prescribes a limited advisory role for the states in this regime. When a subject is treated specifically in a statute, that specific treatment normally prevails over any inferences from more general language in the same enactment. Here, the express terms of Section 220 show that Congress gave the FCC final authority over depreciation and did not reserve to the states any right to use inconsistent rates or methods. See p. 10, above.

Congress' intent is confirmed not only by the language of Section 220 but by its legislative history which, with unusual clarity, shows that Congress did not intend to bar the action taken by the FCC in this case. Section 220 derived from a section of the Interstate Commerce Act which had empowered the ICC to set depreciation of telephone company as well as railroad plant. Prior to 1934, the ICC had already read this section as preempting state power if and when the ICC actually prescribed depreciation for telephone companies and railroads.[29] To avoid this result, the state commissions proposed an amendment, when Section 220 was being drafted, to provide that states could as a matter of right prescribe their own telephone-company depreciation requirements for intrastate ratemaking purposes.[30]

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[28] *General Telephone Company of California* v. *FCC, supra,* 413 F.2d at 401 (Burger, J.), expressly addressing Section 2(b)(1) and other relevant provisions.

[29] See *Depreciation Charges of Telephone Companies* and *Depreciation Charges of Steam Railroad Companies,* decided together at 118 I.C.C. 295, 328-33 (1926), *further proceedings,* 177 I.C.C. 351 (1931).

[30] As proposed by the House Committee, Section 220(j) would in pertinent part have reserved power to each state "to prescribe, for purposes of the exercise of its jurisdiction with respect to any carrier, the percentage rate of depreciation" for any such carrier's property. See S. 3285, 73d Cong., 2d Sess. § 220(j), June 1, 1934 (House Committee version), as reported in H. Rep. No. 1850, 73d Cong., 2d Sess. 7 (1934).

Numerous witnesses, including NARUC, conceded that this proposal would change preexisting law by restricting federal-agency power over depreciation.[31] In essence, the amendment would have given the states what they now seek in this Court. The Senate, however, refused to accept this proposed modification; in the final version of the Act, the Senate prevailed and Congress reenacted for the FCC the ICC's preexisting preemptive authority over depreciation.[32] In substance, the state commissions are urging that the Communications Act be read as *if* Congress had adopted in 1934 the very amendment to Section 220 that Congress refused to adopt.[33]

3. Given the FCC's authority over depreciation of jointly used plant and the lack of any statutory bar to preemption, the only remaining question for the Fourth Circuit was whether the FCC had a rational basis for concluding that federal goals would be frustrated if the states adopted inconsistent rules for depreciating the same telephone plant. California's petition offers only a cursory attack on these detailed findings and the Louisiana jurisdictional statement and Florida and Ohio petitions scarcely address the point.

In this case, the FCC provided ample reasons for its conclusion that preemption was required.[34] For example, in adopting remaining life and equal life group, the FCC stressed

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[31] *E.g., Hearings on S. 2910 Before the Senate Committee on Interstate Commerce,* 73d Cong., 2d Sess. 181 (1934) (statement on behalf of NARUC).

[32] See S. Rep. No. 781, 73d Cong., 2d Sess. 5 (1934); H. Rep. No. 1918, 73d Cong., 2d Sess. 47 (1934).

[33] It is hard to imagine how Ohio could find any comfort in Section 220(j) as actually enacted. In place of the states' proposed version, which would have granted them a statutory right to set their own depreciation rates, Congress maintained federal authority in Section 220(b), and in Section 220(j) offered the states only the consolation of an FCC "investigation" to consider possible legislation.

[34] The objectives sought by the FCC in its new rules are described in its 1980 and 1981 orders (83 F.C.C.2d at 270-92 and 85 F.C.C.2d at 819-30). The ways in which these objectives and other FCC policies would be undermined by inconsistent state depreciation are described in 1983 Decision ¶¶ 30-40 (A-41 to A-47).

that the resulting more accurate depreciation would improve timely capital recovery and permit telephone companies to modernize plant more rapidly. It followed that, if a state could insist on slower and less accurate depreciation for a portion of the investment in precisely the same switch or cable, this federal policy would be frustrated. See 1983 Decision ¶¶ 35-38 (A-44 to A-46). A telephone company does not buy a percentage of a new cable or switch but pays for the whole facility and must recover the whole cost through timely depreciation. If the new cable or switch is not acquired when needed, it is interstate as well as intrastate service that suffers.[35]

Sustaining federal-agency preemption in *de la Cuesta,* this Court emphasized that "it is neither our function, nor within our expertise, to evaluate the economic soundness of the [agency's] approach." 458 U.S. at 169-70. Given the technical nature of depreciation policy and the FCC's detailed rationale, no court of appeals could properly have found that the FCC's preemptive action was "clearly wrong." [36] Certiorari is not warranted to reexamine the agency's decision here that inconsistent state depreciation methods would frustrate federal interests.

Finally, Ohio argues that an evidentiary hearing was required, claiming a lack of "empirical evidence of an actual conflict." Ohio Pet. 15-16. However, no one disputes that some states have adopted depreciation methods inconsistent with those of the FCC,[37] and the central controversy involved the FCC's *judgment* that the use of inconsistent methods by the states would frustrate federal policy. The FCC provided an opportunity for parties to submit any relevant factual information in written form, and nothing in the Act mandates a different procedure. The use of written submissions accords

[35] The FCC also described other adverse effects on federal policy, including the threat to the FCC's regulation of separations. By insisting on slower and less accurate depreciation for a portion of the same facility, a state could effectively shift a greater portion of the cost to interstate rates. 1983 Decision ¶ 39 (A-47).

[36] *United States* v. *Shimer, supra,* 367 U.S. at 782. See also *Capital Cities Cable, Inc.* v. *Crisp,* quoted at p. 10, above.

[37] See 1983 Decision ¶ 37 (A-45). In fact, even after the FCC's preemption decision, several states sought to ignore the FCC's depreciation rules. See pp. 18-19, below.

with the FCC's prior practice in earlier cases, including the *NCUC* and *Computer II* cases, where its preemptive actions were sustained by the courts.

II. The Decision Below Does Not Preempt the Field of Intrastate Ratemaking, Reverse Long-Established FCC Practice or Warrant Certiorari Because of Its Relation to Any Other Pending Case.

1. The state commissions broadly assert that the FCC has virtually preempted all intrastate ratemaking. The FCC's action is described as a "historic move" (Calif. Pet. 8) and a "dramatic clash" between competing sovereigns over control of intrastate ratemaking. La. J.S. 19, 22. In fact, the FCC's action in this case is restricted solely to depreciation, and it involves a section of the Act that, in its language and legislative history, is directly concerned with depreciation.

Intrastate ratemaking has not been preempted by the FCC's action here. As conceded below by the state commissions,

> "the preemption order affects neither the myriad of other factors affecting the total revenue requirement, which must be derived from the aggregate of individual prices, nor the prices for individual services (rate design)." [38]

In other words, the FCC's decision on depreciation affects only a single element in the ratemaking equation.[39] It does not determine the total revenue requirement for intrastate services (which includes numerous investment and expense categories),

[38] Brief, p. 37, filed by the petitioner Virginia State Corporation Commission in the court below, and joined *inter alia* by the Ohio, Florida and California commissions.

[39] Furthermore, so far as depreciation does affect rates, its impact is more complex and evenhanded than the petitions suggest. Recognizing depreciation when it occurs, instead of deferring it to later years, may enlarge the depreciation expense in an earlier year; but such an action not only reduces depreciation expenses in succeeding years but reduces more rapidly the net investment on which a return is earned. Ultimately, timely recognition of depreciation should lead to lower overall rates as well as better service to the public.

or the rate of return on intrastate investment, or the allocation of the intrastate revenue requirement among the many intrastate services. All of these matters, central in establishing intrastate rates, remain the province of the states.[40]

Because the FCC's authority over depreciation rests directly on Section 220, it is equally unsound for Ohio (Pet. 19) to suggest that the "rationale" of the Fourth Circuit decision automatically extends FCC authority to every aspect of ratemaking. It is a familiar, but unconvincing, tactic to argue for certiorari on the ground that the agency may in a later case take some different measure that may be beyond its authority. Agency preemption depends on the precise action taken and the agency's stated reasons. The time to consider FCC preemption of intrastate rates will occur if and when the FCC ever seeks to take such action.[41]

2. Both California and Louisiana contend that in the past the states have set their own depreciation rates for jointly used telephone plant and they assert that the FCC's preemption order is therefore inconsistent with past practice. As the Court of Appeals found, for many years state commissions have tended voluntarily to follow federal directives on depreciation. 737 F.2d at 394 (A-12). Thus, with rare deviations, actual practice, continued over 40 years, has been consistent with the FCC's superintendence of depreciation, and it was only recently

[40] Congress clearly understood that various FCC actions would affect both interstate and intrastate rates. In fact, a first step in determining both sets of rates is to allocate investment and expenses between interstate and intrastate services, and this allocation is made by the FCC. See p. 3, n.3, above.

[41] Louisiana is singularly misleading in citing to an enforcement action against it. The Louisiana commission, enjoined by the district court to respect the FCC's depreciation rules, responded in a way that the district court found to disregard its injunction. The district court's choice of remedy did not represent FCC preemption but rather the exercise of federal-court jurisdiction to assure that federal injunctions are respected. See *South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n*, 744 F.2d 1107 (5th Cir. 1984), *appeal pending*, No. 84-870.

that it became necessary for the FCC to assert preemptive authority. See 1983 Decision ¶ 29 (A-40).[42]

Moreover, even if past practice were otherwise, it would not impair the FCC's authority to preempt if and when the FCC found that new conditions warranted that step. Where the federal agency itself preempts and makes the required findings, it may well be that states were free to deviate *until* the federal decision to preempt. In *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375 (1983), this Court made clear that many years of state regulation do not deprive a federal agency of authority to preempt:

> "There may come a time when the [federal agency] changes its present policy, and announces that state regulation of rural power cooperatives is inconsistent with federal policy. If that were to happen, and if such a rule was valid under the Rural Electrification Act, *it would of course pre-empt* any further exercise of jurisdiction by [the state commission]." *Id.* at 388-89 (emphasis added).

A discretionary power to preempt through federal agency action is a latent power, which does not preclude state deviation before the power is exercised but does preclude it thereafter. Such a preemptive power means that the agency can, based on proper findings, alter past practice and change the *status quo*.[43]

[42] Most of the examples of alleged state deviation do not involve depreciation or are explained by a specific FCC waiver which for many years has permitted additional, state-required subaccounts "provided such subdivisions do not impair the integrity of the accounts prescribed" by the FCC. See 47 C.F.R. § 31.01-2(d)(1). For instance, of the four court cases cited by Louisiana in one footnote (J.S. 28 n.105), three do not involve depreciation at all; and two of those cases are concerned with different industries under other regulatory regimes. Similarly, of the six state agency authorities cited next by Louisiana (*id.* n.106), four do not involve depreciation in the cited discussion, and in one of the other two the state expressly followed the FCC's determination.

[43] *Northwestern Bell Telephone Co.* v. *Nebraska State Railway Commission*, 297 U.S. 471, 478 (1936). The *Northwestern Bell* case involved the provision of the Interstate Commerce Act that was the direct predecessor of Section 220(b). This Court there read that provision as permitting states to fix depreciation for intrastate telephone service "until" the ICC did so. 297 U.S. at 478-79.

Further, the FCC's latent power is here being exercised not to alter the *status quo* but to maintain it. The states generally followed FCC depreciation rules in the past. The 1983 preemption decision merely assures that this practice will continue.[44]

3. The decision below is consistent with prior decisions in four federal circuits and no conflict exists with any other circuit on the question involved in this case. Nevertheless, California and Louisiana assert that the Ohio Supreme Court has refused to respect the FCC's preemption order and that a number of state commissions have also refused to do so, resulting in several enforcement actions in the federal district courts. Neither circumstance provides a basis for certiorari on the only issue presented by this case, namely, the validity of the FCC's 1983 preemption decision.

The Ohio Supreme Court decision does not constitute a legitimate conflict which justifies plenary review of the issue in this case.[45] This Court made clear only last Term in *FCC* v. *ITT World Communications, Inc.*, 104 S. Ct. 1936 (1984), that the federal courts of appeals have *exclusive* jurisdiction to review FCC orders; the statute clearly precludes any other court from "determin[ing] the validity" of such orders.[46] Under these circumstances, the Ohio Supreme Court lacked authority to pass

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[44] *Pacific Gas and Electric Co.* v. *State Energy Comm'n*, 461 U.S. 190 (1983), cited by Florida, did not involve federal agency preemption. There, as this Court expressly found, Congress had *not* granted a federal agency direct authority over economic issues in nuclear plant construction, and the Nuclear Regulatory Commission disclaimed any authority to pass on economic issues in licensing new plants.

By contrast, in this case Congress gave the FCC express authority over depreciation. The agency not only has exercised that authority but it also has made an explicit finding in this case that state use of inconsistent depreciation for the same plant would frustrate federal policy. Under *Capital Cities Cable* and *de la Cuesta*, the FCC's determination is controlling unless irrational.

[45] *Cincinnati Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984), *appeal pending*, No. 84-623.

[46] The Hobbs Act gives the courts of appeals "exclusive jurisdiction" to enjoin, set aside, suspend, or "determine the validity of" an FCC order. 28 U.S.C. § 2342. It would be difficult to frame language more clearly precluding review in any other court.

on the validity of the FCC's 1983 preemption decision, and its views as to the validity *vel non* of a federal agency decision which it may not review cannot give rise to a conflict justifying the granting of certiorari in this case.[47]

Similarly, no conflict exists between the court below and other courts of appeals in whose jurisdictions enforcement actions have been brought to assure compliance with the new depreciation rules.[48] Enforcement courts can decide whether a particular state commission has disregarded a particular federal depreciation rule, but enforcement courts cannot reconsider the validity of the FCC's preemption order affirmed by the Fourth Circuit.[49] Every district and circuit court involved in the enforcement actions has respected the Fourth Circuit's exclusive authority, except for a single district court which was promptly reversed by the circuit court.[50]

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[47] The refusal of the Ohio Supreme Court to respect an FCC decision sustained by a federal court of appeals gives rise to other issues that this Court has been asked to review in No. 84-623. However, because the *ITT* case establishes that the Fourth Circuit had exclusive jurisdiction to review the 1983 preemption decision, the pendency of the Ohio case in this Court provides no basis for review of the Fourth Circuit's decision.

[48] *E.g., South Central Bell Telephone Co.* v. *Louisiana Public Service Comm'n, supra*, 744 F.2d 1107.

[49] The Fourth Circuit acquired exclusive jurisdiction to review the preemption decision when the first petition to review that order was filed in that circuit. 28 U.S.C. §§ 2112, 2342.

[50] *Southwestern Bell Telephone Co.* v. *Arkansas Public Service Comm'n*, 738 F.2d 901 (8th Cir. 1984), *petition for certiorari pending*, No. 84-483.

CONCLUSION

The Fourth Circuit's decision is consistent with settled preemption doctrine in this Court, with the Communications Act, and with a uniform line of circuit court decisions rejecting, at least six times, the same statutory claims renewed here by the state commissions. The petitions for certiorari should be denied and the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

DONALD MCG. ROSE*
DAVID HORN
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202
513-651-6944

Attorneys for Cincinnati Bell Telephone Company

JOHN WOHLSTETTER*
1800 K Street, N.W.
Washington, D.C. 20006
202-466-2895

Attorney for Continental Telecom, Inc.

CAROLYN C. HILL*
JAMES T. ROCHE
1875 Eye Street, N.W.
Washington, D.C. 20006
202-659-4600

MICHAEL BOUDIN*
DAVID H. REMES
ELIZABETH V. FOOTE
1201 Pennyslvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
202-662-6000

Attorneys for AT&T and the Bell Operating Companies (other than Cincinnati Bell, Nevada Bell, and Pacific Bell)

JUDITH A. MAYNES
W. PRESTON GRANBERY
295 North Maple Avenue
Basking Ridge, NJ 07920
201-221-2004

Attorneys for AT&T

MARIA KENDRO
P.O. Box 11315
Kansas City, MO 64112
913-676-3000

Attorneys for United Telephone System, Inc.

ALBERT H. KRAMER*
2000 M Street, N.W.
Washington, D.C. 20036
202-223-6611

Attorney for North American Telecommunications Association

March 1985

**Counsel of Record*

APPENDIX

Subscribing Parties

American Telephone and Telegraph Company
The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
Cincinnati Bell Telephone Company
Continental Telecom, Inc.
The Diamond State Telephone Company
Illinois Bell Telephone Company
Indiana Bell Telephone Company
Michigan Bell Telephone Company
The Mountain States Telephone and Telegraph Company
New England Telephone and Telegraph Company
New Jersey Bell Telephone Company
New York Telephone Company
North American Telecommunications Association*
Northwestern Bell Telephone Company
The Ohio Bell Telephone Company
Pacific Northwest Bell Telephone Company
South Central Bell Telephone Company
Southern Bell Telephone and Telegraph Company
The Southern New England Telephone Company
Southwestern Bell Telephone Company
United Telephone System, Inc.
Wisconsin Bell Inc.

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* Formerly North American Telephone Association.

Rule 28.1 Listing**

Respondent American Telephone and Telegraph Company retains a minority beneficial interest in Cincinnati Bell Inc. held in a voting trust.

Respondents The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, and New Jersey Bell Telephone Company are subsidiaries of Bell Atlantic Corporation.

Respondent Cincinnati Bell Telephone Company (formerly Cincinnati Bell Inc.) is a wholly-owned subsidiary of Cincinnati Bell Inc. Cincinnati Bell Enterprises Inc. is a wholly-owned subsidiary of Cincinnati Bell Inc. Cincinnati Bell Supply Company, a wholly-owned subsidiary of Cincinnati Enterprises Inc., is a 49 percent partner in a joint venture with Anixter Bros., Inc. Cincinnati Bell Cellular Systems Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 46 percent partner in a joint venture with American Information Technologies Corporation.

Respondent Continental Telecom Inc. owns 50 percent of American Satellite Company.

Respondents Illinois Bell Telephone Company, Indiana Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell Inc. are subsidiaries of American Information Technologies Corporation.

Respondents The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company are subsidiaries of U S West Inc.

Respondents New England Telephone and Telegraph Company and New York Telephone Company are subsidiaries of NYNEX Corporation.

** Counsel understand S. Ct. R. 28.1 to require disclosure only of those subsidiaries or affiliates with outstanding securities in the hands of the public.

Respondents South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company are subsidiaries of Bell South Corporation.

Respondent Southwestern Bell Telephone Company is a subsidiary of Southwestern Bell Corporation.

Respondent United Telephone System, Inc., is a subsidiary of United Telecommunications, Inc., which has a minority interest in The Southern New England Telephone Company; respondent's affiliates are United Telephone Company of Arkansas, United Telephone Company of the Carolinas, United Telephone Company of Florida, United Telephone Company of Indiana, Inc., United Telephone Company of Iowa, United Telephone Company of Kansas, United Telephone Company of Minnesota, United Telephone Company of Missouri, United Telephone Company of New Jersey, United Telephone Company of the Northwest, United Telephone Company of Ohio, United Telephone Company of Pennsylvania, United Telephone Company of Texas, Inc., United Telephone Company of the West, Carolina Telephone and Telegraph Company, New Jersey Telephone Company, North Supply Company, and United Inter-Mountain Telephone Company.